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No. 94-1523

In the Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF ALASKA, PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Quiet Title Act of 1972, 28 U.S.C. 2409a, authorizes suits against the United States to adjudicate title disputes regarding real property in which the United States claims an interest, but excludes suits pertaining to "trust or restricted Indian lands" (28 U.S.C. 2409a(a)). The question presented is whether, as the courts below held, that exclusion left the federal courts without jurisdiction to review a determination by the Department of the Interior that an allotment held in trust by the United States for the heirs of an Alaska Native takes precedence over a State's right-of-way.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported. The order of the district court (Pet. App. 9a-12a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1994. The court of appeals denied Alaska's petition for rehearing on December 19, 1994. Pet. App. 27a. The petition for a writ of certiorari was filed on March 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Alaska challenges a determination by the Department of the Interior that a right-of-way that Alaska has been granted on federal land for highway construction materials was preempted by an allotment of a portion of that land to an Alaska Native, Lucy Williams. The Bureau of Land Management (BLM) ruled that Williams's claim took precedence over the State's right-of-way, and, on administrative appeal, the Interior Board of Land Appeals (IBLA) affirmed. Alaska sought judicial review of the IBLA's decision, but the district court held that it lacked subject matter jurisdiction under the Quiet Title Act of 1972 (QTA), 28 U.S.C. 2409a, which excludes from its waiver of sovereign immunity lawsuits against the United States that involve "trust or restricted Indian lands" (28 U.S.C. 2409a(a)). Pet. App. 9a-12a. The court of appeals affirmed. *Id.* at 1a-2a.

1. On August 9, 1971, Lucy Williams, now deceased, applied for a tract of land known as Parcel B, under the Alaska Native Allotment Act of 1906 (1906 Allotment Act), which authorized the Secretary of the Interior to grant up to 160 acres of "vacant, unappropriated, and unreserved nonmineral land" to qualified Alaska Natives.[1] Parcel B, one of

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[1] See Act of May 17, 1906, ch. 2469, 34 Stat. 197. The 1906 Allotment Act was amended by the Act of August 2, 1956, ch. 891, 70 Stat. 954, and codified, during the period relevant here, at 43 U.S.C. 270-1 to 270-3 (1970). On December 18, 1971, the 1906 Allotment Act was repealed by Section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 710, codified at 43 U.S.C. 1617(a). However, Section 18(a) of ANCSA preserved applications, such as Lucy Williams's, that were filed before ANCSA's enactment. 85 Stat. 710.

two parcels requested by Williams, is a 40-acre tract just north of the Tonsina River in south-central Alaska. Williams stated in her application that she had begun using Parcel B for subsistence purposes in July 1955. Pet. App. 35a-37a.

In 1980, while Williams's application was pending before the BLM, Congress revised the allotment process in an effort to reduce a backlog of applications by Alaska Natives awaiting administrative adjudication.[2] The Alaska National Interest Lands Conservation Act of 1980 (ANILCA), 43 U.S.C. 1631 *et seq.*, provided that only three categories of parties —Native Corporations, the State of Alaska, and private parties claiming improvements on disputed land—could protest such applications, and that protests from those entities would not be recognized if filed after May 31, 1981. ANILCA § 905(a)(5), 43 U.S.C. 1634(a)(5). ANILCA further provided that all allotment applications not subject to a valid timely protest by a qualified protestor were automatically approved. ANILCA § 905(a)(1), 43 U.S.C. 1634 (a)(1).

2. In May 1985, the BLM approved Williams's application. Pet. App. 21a-26a. The State had filed one timely protest to that application. It asserted that Williams's request conflicted with an existing public trail.[3] The BLM rejected that protest on the

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[2] That backlog was created when, during the months immediately preceding Congress's enactment in Section 18(a) of ANCSA of the bar against new allotment applications, see note 1, *supra*, Alaska Natives filed an unprecedented number of applications. See *United States* v. *Melgenak*, 127 I.B.L.A. 224, 227-229 (1993) (describing administrative responses to influx of applications).

[3] See Administrative Record (AR) 147-149 (filed with the district court as Clerk's Record (CR) 10).

ground that the State had failed "to provide the specific facts upon which [its] conclusions concerning access [were] based," as required by Section 905(a)(5)(B) of ANILCA, 43 U.S.C. 1634(a)(5)(B). Pet. App. 22a. Because there were no other valid timely protests, the BLM held that Williams's application for Parcel B had been "legislatively approved" by operation of Section 905(a)(1) of ANILCA, 43 U.S.C. 1634(a)(1). Pet. App. 22a.

The BLM's decision briefly described the effect of the approval of Williams's application on other competing claims to Parcel B. The BLM noted that, on August 17, 1965, the State had applied for a 51-acre material-site right-of-way overlapping Parcel B, to be used as a source of highway construction material. Pet. App. 24a; see also *id.* at 32a. That application had been made under the Act of August 27, 1958 (1958 Right-of-Way Act),[4] and was granted by the BLM in April 1966, with the qualification that the State's right-of-way was made subject to "[a]ll valid rights existing on the date of the grant." Pet. App. 33a; see 43 C.F.R. 2234.2-4(b)(4) (1966) (authorizing the BLM to impose "any conditions deemed necessary" or "appropriate"). In approving Williams's application, the BLM noted that Williams's "use and occupancy predates the application and the grant [for the right-of-way]; therefore, Parcel B is approved as stated above." Pet. App. 24a.[5] The BLM

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[4] See Pub. L. No. 85-767, § 1(317), 72 Stat. 916, codified at 23 U.S.C. 317. The 1958 Right-of-Way Act, in part, revised an earlier statute that authorized state acquisition of highway rights-of-way across federal land. See Federal Highway Act of 1921, ch. 119, § 17, 42 Stat. 216.

[5] In its decision, the BLM reserved a federal right-of-way for ditches and canals, based on an 1890 federal statute, but

advised interested parties of their rights to pursue an administrative appeal. *Id.* at 25a. No such appeal, however, was filed. Several weeks after the decision, the State withdrew its protest and waived its right to appeal the BLM's decision.[6]

3. a. In January 1990, the BLM issued a decision that made explicit that the State's material-site right-of-way was null and void insofar as it overlapped Parcel B of the Williams allotment. Pet. App. 17a-20a. The BLM explained that Williams's prior use and occupancy of Parcel B, as established by the BLM's May 1985 decision, afforded her "valid existing rights" to that property. *Id.* at 18a. Because the BLM's 1966 decision granting the State the material-site right-of-way had excluded "valid and existing rights" from the interest conveyed, the BLM reasoned that the right-of-way did not extend to land within Parcel B, which had been allotted to Williams. *Ibid.*

b. Alaska appealed the January 1990 decision to the IBLA, which affirmed the BLM's ruling. Pet. App. 13a-16a. The IBLA rejected Alaska's claim that a right-of-way grant is necessarily superior to

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it mentioned no parallel reservation for any state interest. Pet. App. 23a. The BLM also ruled that legislative approval of Williams's claim defeated applications filed in the mid-1970s by the State and by Native Corporations under selection provisions of the Alaska Statehood Act of July 7, 1958, Pub. L. No. 85-508, § 6(b), 72 Stat. 340, codified at 48 U.S.C. Ch. 2 note, and ANCSA. Pet. App. 23a-24a.

[6] By letter dated May 30, 1985, Alaska withdrew its protest in order to "allow[] the affected parcel to be considered by the [BLM] for approval in accord with provisions of ANILCA" and "waive[d] in advance its right to appeal the pro forma BLM decision dismissing this protest." See AR 187 (CR 10).

a Native allottee's interest in land where the allottee has filed her application for allotment after the right-of-way has been granted. Rather, the IBLA stated,

> an inchoate preference right, established by Native use and occupancy at the time of the right-of-way grant[,] becomes a vested preference right upon completion of use and occupancy and the filing of an allotment application and "*preempts conflicting applications filed after* [initiation of use and occupancy] *although prior to filing of the Native allotment application.*"

Id. at 15a-16a, quoting *State of Alaska (Albert Allotment on Reconsideration)*, 110 I.B.L.A. 224, 229 (1989) (emphasis and bracketed language added by the IBLA in this case).[7]

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[7] Although the BLM recognized in 1985 that Williams's rights based on her long-standing use and occupancy take precedence over the State's right-of-way, it was not until 1987 that the IBLA first recognized preference rights that "relate back" to the allottee's qualifying use and occupancy. See *Golden Valley Elec. Ass'n (On Reconsideration)*, 98 I.B.L.A. 203, 208 (1987). *Golden Valley* reversed earlier IBLA precedent on that issue, see, *e.g.*, *United States* v. *Flynn*, 53 I.B.L.A. 208, 234 (1981), based on the IBLA's review of the analyses by federal courts of the interests of allottees. See, *e.g.*, *Alaska* v. *13.90 Acres of Land*, 625 F. Supp. 1315, 1319 (D. Alaska 1985) (potential allottee's "inchoate preference right" relates back to initiation of occupancy and thus defeats right-of-way claim), aff'd *sub nom. Etalook* v. *Exxon Pipeline Co.*, 831 F.2d 1440 (9th Cir. 1987); *Aguilar* v. *United States*, 474 F. Supp. 840, 845 (D. Alaska 1979) (Alaska Natives' preference rights are based on use and occupancy and thus preclude conveyance of potential allotments to the State); cf. *Stockley* v. *United States*, 260 U.S. 532, 544 (1923) (Presidential order withdrawing

4. Alaska brought suit in federal district court against the United States and the Secretary of the Interior, claiming that the IBLA had erred when it neither rejected Williams's request for Parcel B outright nor made her allotment subordinate to the State's right-of-way. The district court dismissed the State's claim for lack of subject matter jurisdiction. Pet. App. 9a-12a.[8] The court reasoned that Alaska's only plausible jurisdictional basis for suing the federal government was the QTA, 28 U.S.C. 2409a, which waives the United States' sovereign immunity and permits plaintiffs to name it as a defendant in civil actions to adjudicate title disputes involving real property in which the United States claims an interest. The court noted, however, that the QTA expressly excludes from its waiver of sovereign immunity disputes concerning "trust or restricted Indian lands" (28 U.S.C. 2409a(a)). Pet. App. 10a. Under circuit precedent, the district court noted, the

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land from public domain does not apply to unpatented homestead claim since "preliminary homestead entry * * * confer[s] * * * exclusive right of possession"); *United States* v. *Dann*, 873 F.2d 1189, 1199 (9th Cir.) ("prior occupancy by individual Indians may create enforceable preferences under subsequent statutory allotment acts"), cert. denied, 493 U.S. 890 (1989).

[8] The district court initially held that the case should be remanded to the IBLA so as to clarify the IBLA's basis for rejecting a claim that Alaska had made that Williams's application for Parcel B had been untimely. Pet. App. 3a-8a. On reconsideration, however, the district court held that sufficient evidence of timeliness existed to support the IBLA's decision to treat Williams's application as valid. *Id.* at 11a. In its petition for a writ of certiorari, the State does not renew its attack on the timeliness of Williams's allotment application.

United States need only assert a "colorable claim" that the lands in question are trust or Indian lands in order to invoke the QTA's Indian lands exception. *Id.* at 11a, quoting *Wildman* v. *United States*, 827 F.2d 1306, 1309 (9th Cir. 1987). The court concluded that the United States had "clearly" asserted such a claim in this case. Pet. App. 11a.

5. On appeal, Alaska cited the waivers of sovereign immunity set forth in the Administrative Procedure Act (APA), see 5 U.S.C. 702, and the QTA, see 28 U.S.C. 2409a(a), but relied primarily on an argument that an "*ultra vires* exception to sovereign immunity" excused the State from the usual requirement that it identify an express waiver of federal sovereign immunity. See Alaska C.A. Br. 1, 18-30.

While Alaska's appeal was pending, the court of appeals decided *Alaska* v. *Babbitt (Albert Allotment)*, 38 F.3d 1068 (9th Cir. 1994), and ordered the parties in this case to submit supplemental briefs addressing the effect of that decision. In *Albert*, the court of appeals upheld the dismissal, for lack of jurisdiction, of a suit by Alaska seeking review of a decision by the Interior Department holding that a right-of-way was subordinate to a Native allotment. As in this case, the State in *Albert* had relied on the waiver of sovereign immunity provided by the APA and on its asserted ultra vires exception to sovereign immunity. In particular, the State had argued that the Secretary of the Interior had exceeded his statutory authority in ruling that an allottee's preference rights took precedence over a subsequently granted highway right-of-way where those rights were based on the allottee's use and occupancy that predated the right-of-way. The court of appeals in *Albert* ruled, however, that the QTA's

express exclusion of suits relating to "trust or restricted Indian lands" precludes bringing an action relating to such lands under the APA, provided that the United States has a "colorable claim" that the lands are trust or restricted lands. 38 F.3d at 1073, quoting *Wildman*, 827 F.2d at 1309. The court in *Albert* also rejected the State's claim that the Secretary lacks colorable legal authority to establish a formal trust interest in property without preserving what the State termed its "intervening vested rights." 38 F.3d at 1075. The court noted that, for the QTA's exclusion to apply, the government need demonstrate only that it had "some rationale for its claim." *Id.* at 1076. The Secretary's "relation-back" doctrine satisfied that standard, the court held, because it was based on reasoned analysis and "not undertaken in either an arbitrary or frivolous manner." *Ibid.* Thus, the court concluded, there is "absolutely no indication that the IBLA acted outside its statutory authority in making its determinations regarding the preclusive effect of legislative approval and the relation back of Albert's valid existing rights." *Ibid.* The court also found that the State's failure to show that Interior officials had exceeded their statutory authority defeated the State's attempt to avoid the United States' sovereign immunity by framing its claim as a challenge to ultra vires conduct. *Id.* at 1076 n.7.

In this case, the court of appeals, after "consider[ing] the briefs, record and supplemental briefs" submitted in light of *Albert*, summarily affirmed the district court's judgment. Pet. App. 1a-2a. The court explained that Alaska's appeal "cannot be distinguished from the decision" in *Albert*, and that, under

the QTA, the government is therefore immune from Alaska's suit. *Id.* at 2a.

ARGUMENT

Alaska renews its claim (Pet. 9) that, notwithstanding the QTA's exclusion of suits pertaining to "trust or restricted Indian lands" (28 U.S.C. 2409a (a)), the Secretary's decision to allot Parcel B to Lucy Williams without subordinating her interest to the State's right-of-way was subject to judicial review. The court of appeals' ruling that sovereign immunity precluded review is, however, correct, and does not conflict with any decision of this Court or any other court. Further review is therefore unwarranted.

1. Under the QTA, the United States, subject to certain exclusions, has waived the federal government's immunity from title challenges. The QTA was enacted "to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983); see *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986). The QTA provides, however, that its waiver of sovereign immunity "does not apply to trust or restricted Indian lands." 28 U.S.C. 2409a(a). That exclusion serves "to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians." *Mottaz*, 476 U.S. at 842. Congress retained federal immunity against such lawsuits in recognition of the " 'solemn obligations' and 'specific commitments' that the Federal Government had made to the Indians regarding Indian lands," and the consequent inappropriateness of unilaterally "subject[ing] those lands to suit with-

out the Indians' consent." *Id.* at 843 n.6; *Block*, 461 U.S. at 283; *Albert*, 38 F.3d at 1072-1073 & n.4. The QTA's express exclusion of title suits involving trust or restricted land prevents parties from obtaining review of such claims in suits under the APA, because the APA specifically confers no "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought," and the QTA is such an "other statute." *Block*, 461 U.S. at 286 n.22; see also *ibid.* ("the QTA expressly 'forbids the relief' which would be sought under [5 U.S.C. 702]"); *Albert*, 38 F.3d at 1075.

Alaska argues (Pet. 9-12, 19-22) that, notwithstanding the unavailability of judicial review under either the QTA or the APA, review is appropriate because it has challenged what it claims is ultra vires action by the Secretary of the Interior. In so arguing, the State relies on *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), and *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), which concluded that courts would have jurisdiction over land-related suits against federal officers where officers acted outside of the scope of their constitutional or statutory authority. However, as this Court's decision in *Block* makes clear, the QTA, which postdates *Larson* and *Malone* and was in large measure enacted in response to those decisions, displaces all other bases—statutory and nonstatutory—for judicial review of claims challenging federal interests in real property, and hence precludes claims based on ultra vires action by federal officials.

In *Block*, the State of North Dakota filed suit in federal court, seeking to challenge the federal government's claim of title to portions of the bed of the

Little Missouri River. North Dakota argued that its claim could be adjudicated as an officer's suit challenge to what it asserted was ultra vires official conduct, despite the fact that review under the QTA was barred by the QTA's 12-year statute of limitations. The Court held that jurisdiction did not lie for North Dakota's claim outside of the QTA.

The Court in *Block* began by recounting the history of suits against the United States involving title to land. Prior to *Malone*, the Court noted, litigants had sought, with varying success, to overcome federal sovereign immunity by filing suit against the federal officials in charge of supervising the disputed area, rather than against the United States. *Block*, 461 U.S. at 281. In *Malone*, the Court held that the rule of *Larson* applied in the land-dispute area. That rule provided that the conduct of a federal officer affecting property can be made the basis of a suit against the officer "only if the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.'" *Block*, 461 U.S. at 281, quoting *Malone*, 369 U.S. at 647, quoting in turn *Larson*, 337 U.S. at 702. The resulting "*Larson-Malone* test," the Court in *Block* noted, generally left citizens asserting title to or the right to possess lands claimed by the United States without recourse to the courts, and discontent with that state of affairs induced Congress to enact the QTA. 461 U.S. at 282. The QTA accordingly waived the federal government's sovereign immunity over such disputes, subject to discrete exclusions (including that for Indian lands), and with the proviso that claims under the QTA are subject to a 12-year statute of limitations. *Id.* at 282-284.

Based on the history of the QTA, the Court in *Block* held, North Dakota could not "avoid the QTA's statute of limitations and other restrictions by the device of an officer's suit." 461 U.S. at 284. If such a suit were allowed, the Court explained, "all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted." *Id.* at 284-285. Further, the Court noted, "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Id.* at 285, quoting *Brown* v. *GSA*, 425 U.S. 820, 833 (1976). In light of that holding, the Court found it unnecessary to decide "whether, prior to 1972, [*Larson*] and [*Malone*] would have permitted an officer's suit to be maintained under the present circumstances." 461 U.S. at 285-286.

The analysis in *Block* makes clear that judicial review of Alaska's title claim against the United States is unavailable, because that claim is based not on the "careful and thorough remedial scheme" set forth in the QTA, 461 U.S. at 285, but instead on a nonstatutory theory of ultra vires conduct by a government officer. Indeed, the Court in *Block* noted that recognition of such a theory would undercut the carefully considered exceptions to and limitations upon the QTA's waiver of sovereign immunity:

> *If we were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the Indian lands exception to the QTA would be rendered nugatory.* The United States could also be dispossessed of the disputed property without being afforded the option of

> paying damages, thereby thwarting the congressional intent to avoid disruptions of costly federal activities. Finally, and most relevant to the present cases, the QTA's 12-year statute of limitations * * * could be avoided.

Id. at 285 (emphasis added).[9] Because the QTA is thus "the exclusive means by which adverse claimants c[an] challenge the United States' title to real property," *id.* at 286, Alaska's officer's suit was properly dismissed.[10]

2. Even if nonstatutory review of title claims against the United States were available under an ultra vires theory, Alaska fails to demonstrate ultra

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[9] Cf. *Dalton* v. *Specter*, 114 S. Ct. 1719, 1727-1728 (1994) (even assuming that "some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA[,] * * * such review is not available when the statute in question commits the decision to the discretion of the President").

[10] We do not argue that the United States may avoid a lawsuit that raises a title claim simply by asserting under the QTA, without any foundation, that the claim involves trust or restricted land. The court of appeals held that the United States must have a colorable basis for its assertion that the disputed property qualifies as trust or restricted Indian land. *Albert*, 38 F.3d at 1076; *Wildman*, 827 F.2d at 1309. The court of appeals found that the United States had such a colorable basis for its assertion regarding the property in this case, and Alaska does not allege otherwise, arguing instead on the merits that the Secretary was not authorized to give Williams's allotment precedence over the State's right-of-way. We note that Alaska's suit further conflicts with the comprehensive scheme established by the QTA in that Alaska filed its lawsuit without providing 180 days' prior notice of its intention to file a quiet title action against the United States. See 28 U.S.C. 2409a(m).

vires conduct in this case. Alaska claims (Pet. 12-14) that the Secretary of the Interior exceeded his authority under the 1906 Allotment Act to allot "vacant, unappropriated, and unreserved nonmineral land" (43 U.S.C. 270-1 to 270-3 (1970)), because, in Alaska's view, the land allotted to Williams had earlier been appropriated and transferred to Alaska and was mineral in character. But the Secretary's decision to recognize that an allottee's interest has priority over a state right-of-way where the allottee's use and occupancy of the land predated the existence of the right-of-way was not only colorably within the Secretary's authority, as the court of appeals noted in rejecting a parallel claim of ultra vires conduct in *Albert*; [11] in our view, it was plainly so.

a. Alaska first argues (Pet. 12-14) that the Secretary exceeded his authority because the land allotted to Williams in 1985 had previously been "appropriated" to the State in the 1966 right-of-way grant. Alaska claims that the proviso to that grant making the right-of-way subject to "[a]ll valid rights existing on the date of the grant" (Pet. App. 33a) is inapplicable because Williams had not claimed her preference right to Parcel B until after the right-of-

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[11] The court of appeals in *Albert* did not consider whether, under this Court's decision in *Block*, nonstatutory adjudication of title claims against the United States was precluded altogether under the QTA. The federal appellees did not have an opportunity to make that argument in *Albert* because Alaska first raised its ultra vires argument in its reply brief, and *Albert* was decided without oral argument. The court of appeals has, however, since recognized that, under *Block*, "officer's suits could not be used to circumvent the exclusive remedy of the QTA." *Fadem* v. *United States*, No. 92-56404 (9th Cir. Apr. 3, 1995), slip op. 3573, 3581.

way was granted. Pet. 13. Alaska's implicit assumption that allotment rights cannot "relate back" to the allottee's initiation of use and occupancy of the land is, however, unsubstantiated. The Interior Department has taken the position, based on federal case law, that the initiation of use and occupancy under the 1906 Allotment Act affords an allottee contingent rights, which may later be perfected through the filing of a timely application, against future claimants to the same land. Pet. App. 15a-16a; see page 6 & note 7, *supra* (citing cases); see also *Albert*, 38 F.3d at 1076 ("IBLA's 'relation back' analysis was based upon its reasoned interpretation" of the case law). Neither the 1958 Right-of-Way Act nor the April 1966 right-of-way grant compels Alaska's interpretation that such contingent rights were not "valid rights existing on the day of the grant" within the meaning of the proviso to the grant. See Pet. App. 38a.

Alaska's argument that the Secretary erred in determining that Williams possessed a "valid existing right" in Parcel B as of 1966 merely reflects a disagreement over the interpretation of the scope of the right-of-way grant itself. The existence of such a disagreement does not establish that the Secretary has exceeded his statutory authority; on the contrary, Alaska has never disputed the Secretary's authority to interpret the terms of such grants and to resolve conflicting claims relating to the same parcel of federal land. Disputes over the interpretation of legal materials within the scope of an agency's responsibility cannot give rise to a cause of action for nonstatutory review of allegedly ultra vires executive conduct. See *Malone*, 369 U.S. at 644 n.2, 647-648 (allegation that federal officials occupy land under

defective title does not make out claim of ultra vires conduct); compare *Payne* v. *Central Pacific Ry.*, 255 U.S. 228, 234-235, 238 (1921) (finding of ultra vires executive action based on "depart[ure] from a plain official duty").

b. Alaska also claims (Pet. 14) that the Secretary's allotment of Parcel B to Williams was ultra vires because it was not "nonmineral land," as required by the 1906 Allotment Act. Alaska's basis for that claim is the fact that it operates a gravel pit on Parcel B, which has supplied material for the construction and maintenance of a nearby highway. Pet. 14 (citing Pet. App. 40a (affidavit of state highway right-of-way agent Shari Howard)). But Alaska's claim that Parcel B was mineral in character is not established by the record of this case, and, in any event, the State's failure to raise that claim earlier precludes it from relying on it here as a basis for establishing ultra vires conduct.

The Interior Department's methodology for determining whether lands are mineral in character under the 1906 Allotment Act involves ascertaining whether mineral deposits on the land could be expected to support a profitable, commercial mining operation.[12]

[12] The IBLA has defined "nonmineral lands" as lands

> not known to contain any substance recognized and classed by standard authorities as mineral, in such quantities and of such qualities as would, with reasonable prospects of success in developing a paying mine thereon, induce a person of ordinary prudence to expend the time and money necessary to such development.

Heirs of Simon Paneak, 55 I.B.L.A. 305, 310-311 (1981). That inquiry parallels the test of anticipated profitability used to determine whether a miner has discovered a patentable mineral deposit. See, *e.g.*, *McCall* v. *Andrus*, 628 F.2d 1185, 1188 (9th Cir. 1980), cert. denied, 450 U.S. 996 (1981).

That determination is made "at the time equitable title was earned[,] which is the actual date when proof of use and occupancy was *filed* with BLM." [13] The fact that Alaska presently operates a gravel pit on Parcel B does not establish that the parcel would have supported a profitable commercial gravel mine in 1971, when Williams submitted her application.

In any event, the State forfeited its right to claim that Parcel B was mineral in character when, in challenging Williams's application on another ground, it failed to raise that claim before the BLM. Moreover, despite the fact that the BLM concluded that Parcel B was "without value for minerals" (Pet. App. 23a), the State declined to challenge that finding in its later submission to the IBLA.[14] The State's failure to exhaust its administrative remedies with regard to its present assertion that Parcel B is mineral in character precludes it from relying on that assertion as a basis for establishing ultra vires conduct. See, *e.g.*, *McKart* v. *United States*, 395 U.S. 185, 194-195 (1969). Reopening that issue would frustrate Congress's goal, in enacting ANILCA, of providing repose for Alaska Natives whose allotment applications had long been pending before the Interior Department. See ANILCA § 905, 43 U.S.C. 1634.[15]

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[13] U.S. Dep't of the Interior, Bureau of Land Management, *Native Allotment Handbook* II-31 (1991).

[14] See AR 485, 503, 509 (CR 10) (State's submissions to IBLA).

[15] Alaska relies (Pet. 24-25) on *State of Alaska Dep't of Transp. & Public Facilities (Mary Sanford)*, 131 I.B.L.A. 121 (1994), but that case is inapposite. In *Sanford*, the IBLA resolved a claim that land was mineral in character in favor

3. Finally, Alaska argues (Pet. 14-16) that the decision below conflicts with *Foust* v. *Lujan*, 942 F.2d 712 (10th Cir. 1991), cert. denied, 503 U.S. 984 (1992). *Foust*, however, is entirely inapposite. The plaintiff in *Foust* filed suit challenging an error in a land patent issued by the United States to his predecessor in title; that error resulted in the predecessor's being conveyed the wrong parcel. The BLM found for Foust; the IBLA reversed; but, on appeal, the court of appeals found for Foust. In the portion of the decision on which Alaska relies, the court of appeals rejected the argument of an intervenor Indian tribe—which, after the conveyance to Foust, had been restored ownership of the remaining federal lands in the area surrounding Foust's land—that the Department lacked authority to make the requested correction because its authority to correct patents extends only to "public lands," see 43 U.S.C. 1702(e), whereas the land sought by the plaintiff was now tribal. 942 F.2d at 715. The court of appeals held that the status of the disputed lands was to be assessed as of the time when the allegedly erroneous patent was issued, and that Foust's claim for correction could therefore proceed. *Ibid.* Based on that holding, Alaska argues (Pet. 16) that, in this case, the conflicting rights of Williams and

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of the State, based on a BLM mineral report that determined that part of the land requested in the disputed allotment application "possess[ed] mineral materials in such quantity and quality as to be designated mineral in character" and that a "market exist[ed] * * * for the material." 131 I.B.L.A. at 127, quoting *Ahtna, Inc.*, 100 I.B.L.A. 7, 17-18 (1987) (quotations omitted). By contrast, in this case, Alaska neither requested a mineral report nor offered independent evidence that Parcel B contained commercially valuable gravel deposits.

Alaska should have been resolved as of 1966, when "the [right-of-way] interest conflicting with Indian title was created." *Foust*, however, did not address the legal doctrines that are dispositive here—*i.e.*, the Interior Department's "relation-back" doctrine, under which allottees' rights are measured as of the date of initiation of use and occupancy, and the Indian lands exception to the QTA. Thus, *Foust* provides no support for Alaska's position.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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